IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 25, 2009 Session

STEPHANIE H. HEWITT
v.
JOSEPH COOK

Appeal from the Circuit Court for Macon County
No. 4681-6-252 Clara W. Byrd, Judge

No. M2008-01569-COA-R3-CV - Filed September 16, 2009

This is an appeal from the denial of a Rule 60 motion. The mother and father were divorced in 2002. In May 2005, the mother filed a contempt petition against the father for failure to pay child support and also sought a judgment for the past-due support. In September 2006, the father was found in contempt and the mother was awarded a judgment. The father paid neither the judgment nor the current support obligation. In January 2007, the mother filed another contempt petition. After the second contempt petition was filed, the father's attorney withdrew from representing him. A hearing was held on the mother's contempt petition in August 2007, but the father did not attend. In September 2007, the trial court entered another order finding the father in contempt and awarding the mother another judgment. In March 2008, the father filed a Rule 60 motion for relief from the judgment, arguing that he did not have notice of the August 2007 hearing, was never sent a copy of the judgment, and only learned of the judgment in December 2007. The motion also sought the recusal of the trial judge. The trial court denied the father's Rule 60 motion and motion for recusal. The father now appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and DAVID R. FARMER, J., joined.

Mark W. Henderson, Mt. Juliet, Tennessee, for the Respondent/Appellant Joseph Cook

Joy Davis Collier, Franklin, Tennessee, for the Petitioner/Appellee Stephanie H. Hewitt

MEMORANDUM OPINION[1]

FACTS AND PROCEDURAL HISTORY

Respondent/Appellant Joseph Cook ("Father") and Petitioner/Appellee Stephanie H. Hewitt ("Mother") were divorced by final decree entered on July 19, 2002. Mother was awarded sole custody of the parties' three minor children, with Father receiving the right to residential parenting time.

On May 11, 2005, Mother filed her first petition for civil and/or criminal contempt. In the petition, she asked the trial court to, *inter alia*, hold Father in contempt and award her a judgment against Father for his failure to pay child support.

Subsequently, on June 5, 2006, Father's attorney, Sharon Linville, filed a motion to withdraw from her representation of Father, stating that he failed to communicate with her and failed to fulfill his contractual obligations. Although the record does not contain an order granting Ms. Linville's motion to withdraw, it indicates that the trial court granted the motion; on July 10, 2006, Father filed a motion for a continuance of a matter that was set to be heard the next day on the grounds that his attorney had withdrawn on June 9, 2006 and he "needs more time because most attorneys have been on vacation and now returning to a normal work schedule."

On August 28, 2006, a hearing was held on Mother's contempt petition. On September 14, 2006, the trial court entered its order on Mother's petition, finding Father in willful contempt, awarding Mother a judgment for past-due child support in the amount of $15,243.00, and ordering Father to serve thirty days in jail, with the sentence suspended if he paid the child support judgment in full within thirty days. The judgment also ordered Father to pay child support in the amount of $639.56 per month, and further ordered him to pay Mother's attorney's fees in the amount of $5,084.00. This order was not appealed.

Father made no payments towards the $15,243.00 judgment for his child support arrearage, and therefore, served thirty days in jail for contempt. He likewise made no payments towards the

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[1] **Rule 10. Memorandum Opinion**

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Tenn. Ct. App. R. 10.

$5,084.00 judgment for Mother's attorney's fees, and failed to pay his $639.56 monthly child support obligation.

On January 18, 2007, Mother filed a petition for criminal contempt, seeking, *inter alia*, to have Father held in criminal contempt, a judgment for the child support arrearage that had accrued since the September 14, 2006 order, and her attorney's fees. Father's attorney Debra Dishmon ("Ms. Dishmon") filed an answer to Mother's petition on March 12, 2007. In the answer, Father admitted that he had failed to pay any portion of the judgments and that he also failed to make any current child support payments. Father claimed that he was unable to make a lump sum payment and asked the trial court to set a reasonable monthly sum to be paid towards the judgments. Father insisted that he was unable to pay, and that his failure to pay was therefore not willful. Father also sought modification of his child support obligation and for Mother to be held in contempt for her failure to give Father possession of certain items of personal property that he was awarded in the divorce. Mother filed her answer to Father's counter-petition on March 21, 2007. On April 26, 2007, a consent order was entered setting all of these matters for a hearing to be held on August 30, 2007.

On May 23, 2007, Ms. Dishmon filed a motion to withdraw from her representation of Father. As grounds, Ms. Dishmon's motion said that Father had been uncooperative, had failed to communicate adequately with her, and had failed to meet his financial obligations to her. The motion also stated that Ms. Dishmon's withdrawal "will not significantly delay the trial in this case." The trial court's order granting Ms. Dishmon's motion to withdraw was entered on June 4, 2007.

The hearing on Mother's contempt petition, her request for a judgment on Father's child support arrearage, and Father's petition for modification of child support and his cross-petition for contempt was held, as scheduled, on August 30, 2007. Father did not appear at the hearing.

On September 6, 2007, the trial court entered its order on the matters considered at the hearing. The trial court found Father to be in willful civil contempt, awarded Mother a judgment of $30,500.00 for the previous arrearage that Father failed to pay, the additional arrearage that accrued since the September 14, 2006 order, and Mother's attorney's fees. Father was ordered to serve six months in jail with $30,500 serving as his cash bond. The trial court also entered a judgment against Father in the amount of $13,151.25 for monies that he owed Mother to reimburse her for income tax liabilities. The trial court dismissed Father's counter-petition. On the same day, the trial court also entered an order of attachment, attaching Father. Both of the September 6, 2007 orders were signed by the trial judge and Mother's attorney. Neither were signed by Father or an attorney representing Father, and neither had a certificate of service showing that a copy had been served on Father or an attorney representing him.

Thereafter, Father apparently engaged a new attorney, Mark Henderson ("Mr. Henderson"). On March 6, 2008, Mr. Henderson filed a motion on Father's behalf, pursuant to Rule 60 of the Tennessee Rules of Civil Procedure, seeking to have the trial court's September 6, 2007 orders set aside on the grounds that Father did not have notice of the August 30, 2007 hearing and copies of the September 6, 2007 orders were never sent to him. The motion also requested that the trial judge

recuse herself from further proceedings in the matter on the basis that the judge allegedly previously stated that she would not hear any further cases involving Mr. Henderson. In the affidavit submitted in support of his Rule 60 motion, Father stated that, in August 2007, he moved to Florida in order to find employment. Father claimed that he was never notified by either Mother's attorney or the court clerk of the hearing scheduled for August 30, 2007. He also asserted that the September 6, 2007 orders were not sent to him by either Mother's attorney or the court clerk, and that he first learned of the orders on December 12, 2007. At the time he learned of the orders, Father claimed, he could not afford to hire an attorney to challenge either the August 30 hearing or the September 6, 2007 orders.

On April 24, 2008, Mother filed her response to Father's motion for Rule 60 relief. In her response, Mother argued that Father's motion should be denied because his attorney of record at the time, Ms. Dishmon, approved an agreed order setting the hearing on all pending matters for August 30, 2007. Mother said that the court clerk sent a copy of the order setting the hearing date to counsel for the parties after it was entered, and thus Father had notice of the hearing. Mother disputed Father's claim that he did not learn of the September 6, 2007 orders until December 2007. She asserted that Father's family retained an attorney to handle this matter on September 7, 2007, the day after the orders at issue were entered. Mother claimed that Father has a history of making false statements to the trial court, citing his motion filed *pro se* on July 10, 2006, in which he requested a continuance because "most attorneys have been on vacation." Mother also sought an award of attorney's fees for having to defend against Father's motion.

On May 27, 2008, the trial court entered an order denying Father's Rule 60 motion for relief and reserving the issue of Mother's request for attorney's fees. Father then filed a notice of appeal. Finding that the reservation of the attorney's fees issue meant that the May 27, 2008 order was not final and appealable, this Court entered an order requiring Father to obtain a final judgment from the trial court or risk dismissal of the appeal. On August 7, 2009, the trial court amended its May 27, 2008 order to conform to the requirements of Rule 54.02 of the Tennessee Rules of Civil Procedure, thereby making the order final and appealable.

ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, Father raises the following issues for our review:

1. Whether the trial court erred in denying his motion to recuse;

2. Whether the trial court erred in denying his Rule 60 motion based upon his alleged lack of notice of the hearing held on August 30, 2007; and

3. Whether the trial court erred in denying his Rule 60 motion based upon the failure to send him copies of the orders entered on September 6, 2007.

Father asks this Court to vacate the orders entered on September 6, 2007 and order a new trial before a different judge. Mother asks that we find this appeal to be frivolous under Tennessee Code Annotated § 27-1-122 and remand the case to the trial court to assess damages.

We review a trial judge's decision on whether to recuse herself under an abuse of discretion standard. ***Moody v. Hutchison***, 247 S.W.3d 187, 202 (Tenn. Ct. App. 2007) (quoting ***Irvin v. Johnson***, No. 01-A-01-9708-CV-00427, 1998 WL 382200 (Tenn. Ct. App. July 10, 1998)). A trial court's decision on a Rule 60 motion for relief is also reviewed on appeal under an abuse of discretion standard. ***DeLong v. Vanderbilt Univ.***, 186 S.W.3d 506, 511 (Tenn. Ct. App. 2005) (citing ***Federated Ins. Co. v. Lethcoe***, 18 S.W.3d 621, 624 (Tenn. 2000); ***Beason v. Beason***, 120 S.W.3d 833, 839 (Tenn. Ct. App. 2003)).

In applying an abuse of discretion standard of review, the trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting ***State v. Scott***, 33 S.W.3d 746, 752 (Tenn. 2000); ***State v. Gilliland***, 22 S.W.3d 266, 273 (Tenn. 2000)). "A trial court abuses its discretion only when it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.' " ***Id.*** (quoting ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999)).

ANALYSIS

We first address Father's argument that the trial judge erred in declining to recuse herself. Father's argument is based on an order entered in an unrelated case, in which the trial court purportedly stated that she would recuse herself from any further matters involving Father's attorney, Mark Henderson.

Under Supreme Court Rule 10, Cannon 3E, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Tenn. Sup. Ct. R. 10, Cannon 3 E(1). In his argument, Father relies on an order from an unrelated case and attaches the order to his appellate brief. However, he does not indicate that the order was made part of the appellate record in this case, and we have not located this order in the appellate record. Although Father attached the order as an exhibit to his appellate brief, an exhibit to an appellate brief is not a part of the record. ***See UT Med. Group, Inc. v. Vogt***, 235 S.W.3d 110, 122 (Tenn. 2007) (citations omitted). This Court may consider only "those facts established by the evidence in the trial court and set forth in the record." Tenn. R. App. P. 13(c). Thus, we cannot consider the order on which Father relies in his recusal argument. Because there is no evidence in the record indicating that the trial judge's impartiality can reasonably be questioned, we cannot conclude that the trial judge abused her discretion in declining to recuse herself in this case.

We next address Father's argument that the trial court erred in denying his Rule 60 motion for relief from the September 6, 2007 orders, because he allegedly did not receive notice of the August 2007 hearing. Father admits that, on April 26, 2007, all matters were set for hearing on

August 30, 2007 by agreement of counsel. This was before Ms. Dishmon withdrew from representing Father. Father is charged with knowledge of the hearing date because his attorney had knowledge of it. ***See DeLong***, 186 S.W.3d at 510 (citing ***Moody v. Moody***, 681 S.W.2d 545, 546 (Tenn. 1984)). Father argues that he thought that the hearing had been continued because Ms. Dishmon withdrew from representing him in early June 2007 and the order allowing her to withdraw did not mention the date of the upcoming hearing. Father contends that Ms. Dishmon's withdrawal motion added to the confusion by stating that "[t]he withdrawal of counsel will not significantly delay the trial in this case." Father contends that this language could reasonably be understood by a *pro se* litigant to mean that the hearing would be delayed.[2]

In support, Father cites ***Koon v. Duke***, No. E2006-00008-COA-R3-CV, 2006 WL 3431928 (Tenn. Ct. App. Nov. 29, 2006). In ***Koon***, the plaintiffs, proceeding *pro se*, filed suit against the defendants, seeking to invalidate a series of transfers of real property. ***Id.*** at *1. The defendants filed a motion for summary judgment and a motion to dismiss, and included a notice that the motion would be heard on August 29, 2005. ***Id.*** Shortly thereafter, the court clerk sent a letter to the plaintiffs, stating that their "cause" had been set for hearing on October 27, 2005. ***Id.*** at *2. The plaintiffs did not attend the August 29 hearing and consequently their complaint was dismissed. ***Id.*** The plaintiffs then sought relief from the judgment under Rule 60.02, claiming that the two notices caused confusion and asserting their belief that the hearing had been rescheduled. ***Id.*** The trial court declined to set aside the judgment. ***Id.***

On appeal, this Court vacated the trial court's order, finding that the plaintiffs' failure to attend the hearing was excusable neglect. ***Id.*** at *4. The ***Koon*** Court reasoned that, although the letter from the clerk did not reference the hearing on the motion for summary judgment and the motion to dismiss, it was reasonable for a *pro se* party to believe that the hearing on the two motions had been rescheduled. ***Id.*** at *3. While an attorney may have been expected to make further inquiries to determine whether the letter from the clerk referred to the hearing on the motion for summary judgment and the motion to dismiss or a hearing on the merits, the Court found that it was reasonable for a *pro se* party to interpret the notice as the plaintiffs had. ***Id.***

The facts in this case are clearly distinguishable from those in ***Koon***. In this case, Father originally had notice of the date of the hearing. In this case, Father claims that he understood Ms. Dishmon's motion to withdraw to mean that the scheduled hearing would be delayed. In contrast to ***Koon***, Father did not receive any communication from the trial court or the court clerk. Moreover, Ms. Dishmon's motion does not indicate that the August 30, 2007 hearing had been rescheduled to

[2] In support of his argument that he had no notice of the hearing, Father points to the fact that the trial court's order found Father to be in civil contempt, rather than criminal contempt, as Mother's petition sought. Father also notes that he had no notice that the hearing would address the income tax refund issue, and contends that the trial court's order causes confusion that could lead to a double judgement against him because the order incorporates the judgment from September 14, 2006. However, Father's Rule 60 motion did not raise the issues relating to the scope of the hearing or the possibility that the order could cause confusion and lead to a double judgment to the trial court. Because these issues were not raised to the trial court, we do not address them on appeal. ***See*** Tenn. R. App. P. 36(a); ***Alexander v. Armentrout***, 24 S.W.3d 267, 272 (Tenn. 2000).

any other date, and could not reasonably be misinterpreted by a *pro se* litigant to mean that it had been rescheduled. Under these circumstances, we cannot conclude that the trial court abused its discretion in denying Father relief from the judgment on this basis.

Father next argues that the trial court erred in denying his Rule 60 motion for relief from the orders entered on September 6, 2007 on the basis that the orders were never sent to Father. Father did not sign either the order finding him in civil contempt or the order of attachment, and there was no certificate of service showing that the orders were sent to him, as required by Rule 58 of the Tennessee Rules of Civil Procedure. Thus, he argues, the judgment never became effective and he is entitled to a new trial.

Rule 58 of the Tennessee Rules of Civil Procedure provides in pertinent part as follows:

> Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:
>
> (1) the signatures of the judge and all parties or counsel, or
>
> (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or
>
> (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

Tenn. R. Civ. P. 58. Compliance with Rule 58 is mandatory, ***State ex rel. Taylor v. Taylor***, No. W2004-02589-COA-R3-JV, 2006 WL 618291, at *2 (Tenn. Ct. App. Mar. 13, 2006) (quoting ***Gordon v. Gordon***, No. 03A01-9702-CV-00054, 1997 WL 304114, at *1 (Tenn. Ct. App. June 5, 1997)), and "[t]he failure to adhere to the requirements set forth in Rule 58 prevents a court's order or judgment from becoming effective." ***Blackburn v. Blackburn***, 270 S.W.3d 42, 49 (Tenn. 2008) (citing ***DeLong***, 186 S.W.3d at 509). This means that an order that does not comply with Rule 58 "is not a final judgment and is ineffective as the basis for any action for which a final judgment is a condition precedent." ***Citizens Bank of Blount County v. Myers***, No. 03A01-9111-CH-422, 1992 WL 60883, at *3 (Tenn. Ct. App. Mar. 30, 1992) (holding that an execution and garnishment was improper when based on a judgment that did not comply with Rule 58); ***see also State ex rel. Taylor***, 2006 WL 618291, at *3 (dismissing the appeal for lack of a final order when the order appealed from did not comply with Rule 58).

The failure to comply with Rule 58, however, does not invalidate the judgment. ***See Clark v. Wayne Med. Ctr.***, No. M2005-00699-COA-R3-CV, 2007 WL 1585166, at *4 (Tenn. Ct. App. May 31, 2007)***; State v. Williams***, No. 03C01-9404-CR-00148, 1995 WL 13112, at *2 n.2 (Tenn. Crim. App. Jan. 13, 1995). The purpose of Rule 58's signature requirement is "to provide notice to all parties or their counsel before judgment becomes final to allow either party to file a timely appeal." ***Williams***, 1995 WL 13112, at *2 n.2. (quoting Tenn. R. Civ. P. 58, Advisory Commission Comment to 1980 Amendment). In the event of a failure to comply with Rule 58, relief should be sought, as Father did here, by filing a Rule 60 motion. ***See Blackburn***, 270 S.W.3d at 49–50; ***Clark***,

2007 WL 1585166, at *4. As noted above, the decision on a Rule 60 motion is in the discretion of the trial court. ***DeLong***, 186 S.W.3d at 511 (citations omitted).

In this case, Father did not sign the September 6, 2007 orders and there was no certificate of service showing that copies of the orders were sent to Father. Father admits, however, that he received actual notice of the orders on December 12, 2007. Father claims that he did not file a request for relief at that time because he could not afford to hire an attorney to challenge the orders. However, the appellate record includes numerous *pro se* pleadings filed by Father; clearly, the lack of an attorney has not deterred him in the past. Father offers no other explanation for his failure to bring this issue to the trial court's attention sooner than three months after receiving actual notice of the orders. Based on the record, we cannot conclude that the trial court abused its discretion in denying Father's request for Rule 60 relief.[3]

Finally, Mother asks this Court to find that this appeal is frivolous under Tennessee Code Annotated § 27-1-122 and remand the case to the trial court to assess damages. Section 27-1-122 provides as follows:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

T.C.A. § 27-1-122 (2000). The decision of whether to award damages for the filing of a frivolous appeal rests in the discretion of this Court. ***Whalum v. Marshall***, 224 S.W.3d 169, 180–81 (Tenn. Ct. App. 2006) (citing ***Banks v. St. Francis Hosp.***, 697 S.W.2d 340, 343 (Tenn. 1985)). An appeal is frivolous when it has "no reasonable chance of success," or is "so utterly devoid of merit as to justify the imposition of a penalty." ***Id.*** at 181 (quoting ***Jackson v. Aldridge***, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999); ***Combustion Eng'g, Inc. v. Kennedy***, 562 S.W.2d 202, 205 (Tenn. 1978)). Exercising our discretion, we respectfully decline to find that this appeal is frivolous.

CONCLUSION

The decision of the trial court is affirmed, and the request to find this to be a frivolous appeal is denied. The costs of this appeal are taxed to the Appellant Joseph Cook, and his surety, for which execution may issue if necessary.

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HOLLY M. KIRBY, JUDGE

[3] We are not required in this appeal to address the validity or enforceability of the September 6, 2007 orders.